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TO CURB OR NOT TO CURB: APPLYING *HONEYCUTT* TO THE JUDICIAL OVERREACH OF MONEY JUDGMENT FORFEITURES

Matthew L. Allison*

I. INTRODUCTION

In recent years, asset forfeiture, both civilly and criminally, has been ripe for reform as groups on both sides of the political divide have advocated that the system has been abused and corrupted over the years.¹ There have been calls to curb the abuses in both civil and criminal asset forfeiture with legislation currently pending in Congress.² Although there have been calls to end the abuse, in the summer of 2017, Attorney General Jeff Sessions announced a plan to emphasize and prioritize the pursuit of civil asset forfeitures, a pursuit that the Obama administration had chosen to wind down.³

One current type of asset forfeiture that is used in criminal cases is called “money judgment forfeiture.”⁴ Although this type of forfeiture is not directly authorized or allowed by current statutes, various Circuit Courts of Appeal have carved out a judge-made loophole to allow it.⁵ However, in the recently decided Supreme Court case, *Honeycutt v. United States*,⁶ the Court struck down a separate type of criminal asset forfeiture by ruling that joint and several liability⁷ was

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1. *See infra* Section II.C.

2. Nick Sibilla, *Bipartisan Bills in Congress Would Defund Federal Civil Forfeiture, DEA Marijuana Seizures*, FORBES (Jan. 19, 2018, 12:22 PM), <https://www.forbes.com/sites/instituteforjustice/2018/01/19/bipartisan-bills-in-congress-would-defund-federal-civil-forfeiture-dea-marijuana-seizures>.

3. *Sessions Reinstates Asset Forfeiture Policy at Justice Department*, CBS NEWS (July 19, 2017, 4:39 PM), <https://www.cbsnews.com/news/sessions-signals-more-police-property-seizures-coming-from-justice-department/>.

4. *See infra* Section II.B.3.

5. *See infra* note 96 and accompanying text.

6. 137 S. Ct. 1626 (2017).

7. *See infra* notes 151–59 and accompanying text.

not authorized by the statute and should not be applied in the case.⁸ This Comment will argue that the rule established in *Honeycutt* should be applied in the same manner to the subject area of money judgment forfeitures to overturn Circuit Court of Appeals' decisions allowing money judgment forfeitures.⁹ This Comment will also advocate for future legislation to solve the problem of abuse.¹⁰

Part II will explore the history of asset forfeiture in the United States, provide an overview of the three different types of asset forfeiture, and discuss the abuses of the system.¹¹ Part II will also provide an explanation of money judgment forfeitures and how the Circuit Courts of Appeal shaped the surrounding case law.¹²

Part III will survey how the Supreme Court, in recent years, has begun reigning in the governmental reach of asset forfeiture.¹³ It will also discuss the new ruling in *Honeycutt*.¹⁴ Part IV will analyze how the ruling and analysis in *Honeycutt* should be extended and applied to money judgment forfeitures.¹⁵ It will also discuss whether Congress is possibly in a better position to tackle the challenge of reforming money judgment forfeitures as well as the system of asset forfeiture in general.¹⁶ A possible amendment to the criminal asset forfeiture statute will be proposed and examined, one that Congress would be able to implement into law to help curtail the abuse of the system.¹⁷

II. OVERVIEW OF ASSET FORFEITURE

A. *A Brief Overview of the History of Asset Forfeiture*

Black's Law Dictionary defines "forfeiture" in multiple ways including "[t]he divestiture of property without compensation" and "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty."¹⁸ "Asset forfeiture occurs

8. See *infra* Section III.B.

9. See *infra* Section IV.A.

10. See *infra* Section IV.B.

11. See *infra* Part II.

12. See *infra* Section II.B.3.

13. See *infra* Section III.A.

14. See *infra* Section III.B.

15. See *infra* Section IV.A.

16. See *infra* Section IV.B.

17. See *infra* Section IV.B.

18. *Forfeiture*, BLACK'S LAW DICTIONARY (10th ed. 2014). "Civil forfeiture" is defined as "[a]n in rem proceeding brought by the government against property that either facilitated a crime or was acquired as a result of criminal activity." *Id.* "Criminal

when the government seizes and forfeits ownership in an individual's or company's assets because the individual, the company or the property itself was connected to or represents the proceeds of certain types of unlawful activity."¹⁹ The laws of asset forfeiture have been described as "extremely complicated,"²⁰ and the subject area has received "little scholarly attention"²¹ in academic circles.

The concept of asset forfeiture has been around for centuries.²² It has been a part of the law in the United States since the founding of the country.²³ The United States adopted the idea of asset forfeiture from the practices of the British.²⁴ The British developed and "used forfeiture as a weapon to combat piracy and customs offenses on the high seas."²⁵ Following the American Revolution, Congress "enacted [numerous] statutes authorizing the seizure and forfeiture of ships and cargo involved in customs offenses."²⁶ However, criminal asset forfeiture was specifically banned by the drafters of the constitution as they "prohibited the English practice of 'forfeiture of estate,' a criminal penalty that deprived a convicted felon of the ability to transfer any of his property at death."²⁷ Criminal asset

forfeiture" is defined as "[a] governmental proceeding brought against a person to seize property as punishment for the person's criminal behavior." *Id.*

19. ELLEN ZIMILES & JEFFREY LOCKE, DEFENDING CORPORATIONS AND INDIVIDUALS IN GOVERNMENT INVESTIGATIONS § 16.1, Westlaw (database updated Dec. 2017).

20. Catherine E. McCaw, *Asset Forfeiture as a Form of Punishment: A Case For Integrating Asset Forfeiture into Criminal Sentencing*, 38 AM. J. CRIM. L. 181, 185 (2011).

21. *Id.* at 183.

22. ZIMILES & LOCKE, *supra* note 19, § 16.3 n.4.

The concept of asset forfeiture has a deep and rich history. It can be traced back to Exodus where an ox is sacrificed to atone for an offense: "If an ox gore a man or a woman, that they die: then the ox shall surely be stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit." Exodus 21:28. In the Middle Ages and the law of deodand, it was stated: "[W]here a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and yet no default is in the owner." *United States v. Bajakajian*, 524 U.S. 321, 330 n.5, 118 S. Ct. 2028, 141 L. Ed. 2d 314, 172 A.L.R. Fed. 705 (1998).

Id.

23. See Edmund W. Searby, *A Broadening Consensus to Narrow Asset Forfeiture*, L. J. NEWSLS., Sept. 2017, at 1, <http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/09/01/a-broadening-consensus-to-narrow-asset-forfeiture-3>.

24. *Id.*

25. *Id.*

26. STEFAN D. CASELLA, ASSET FORFEITURE LAW IN THE UNITED STATES 29 (2d ed. 2013).

27. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.6(d) (4th ed. 2017).

forfeiture did not return in the legal system until the passing of the Racketeer Influenced and Corrupt Organizations Act (RICO) in the 1970s.²⁸

The asset forfeiture laws remained entrenched in the area of customs laws until the early 1970s.²⁹ In 1970, asset forfeiture began to expand when Congress created the Comprehensive Drug Abuse Prevention and Control Act.³⁰ This law allowed the federal government to “subject property used to facilitate narcotics activity to asset forfeiture.”³¹ Congress expanded the law in 1978 to allow “the government to forfeit the proceeds of drug crimes.”³² Congress expanded the Comprehensive Prevention and Control Act even further in 1984 by authorizing the government to seize property that was used to facilitate drug crimes.³³ This “allowed the government to attack the profitability of criminal activity and to take any property that made the crime easier to commit or harder to detect.”³⁴

The rules of asset forfeiture have been patched together over the years and are found scattered throughout different civil and criminal codes.³⁵ “There is neither a common law of forfeiture nor a single provision authorizing forfeiture in all cases.”³⁶ In his article on asset forfeiture, Stefan D. Cassella, an expert in asset forfeiture,³⁷ comments that “[t]he closest Congress has come to enacting one, all-powerful forfeiture statute is 18 U.S.C. 981(a)(1)(C), which authorizes the forfeiture of the *proceeds* of over 200 different state and federal crimes.”³⁸ This statute provides a prosecutor with the tools to recover the proceeds that a defendant gained from conducting a crime.³⁹ A sampling of the federal crimes covered by the statute are “fraud, bribery, embezzlement and theft,” and state crimes include “murder, kidnapping, gambling, arson, robbery, bribery,

28. *See id.*

29. *See* Sarah Stillman, *Taken*, NEW YORKER (Aug. 12, 2013), <https://www.newyorker.com/magazine/2013/08/12/taken>.

30. ZIMILES & LOCKE, *supra* note 19, § 16.3.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Stefan D. Cassella, *Overview of Asset Forfeiture Law in the United States*, 17 S. AFR. J. CRIM. JUST. 347, 349 (2004).

37. *See About Us*, ASSET FORFEITURE LAW, LLC, http://assetforfeiturelaw.us/?page_id=67 (last visited Jan. 13, 2019). Stefan D. Cassella is a former federal prosecutor with over thirty years of experience in asset forfeiture and now serves as CEO of Asset Forfeiture Law, LLC. *Id.*

38. Cassella, *supra* note 36, at 350.

39. *See id.*

extortion, obscenity, and state drug trafficking.”⁴⁰ As Casella explains in his article, asset forfeiture is important for three main reasons.⁴¹ It provides prosecutors and law enforcement officers a way to remove criminal items from the hands of criminals, it provides a remedy for victims to recover property or be compensated for their losses, and finally, it removes the proceeds that criminals gained from their illegal activities.⁴²

B. Essential Requirements and the Three Main Types of Asset Forfeiture

There are two essential requirements for the government to obtain title of an asset through asset forfeiture.⁴³ The “government must demonstrate that the property to be forfeited has the requisite relationship to criminal activity” and then “the government must show that the law allows it to obtain property when the property bears that relationship to a particular crime.”⁴⁴ The government can then seek to use asset forfeiture under “five separate theories” including:

- (i) contraband — goods that are per se illegal on their face,
- (ii) proceeds of a crime, (iii) instrumentality — the instruments used to commit a crime, (iv) facilitation — property used or intended to be used to facilitate illegal activity, and (v) enterprise, usually under the Racketeer Influenced and Corrupt Organizations Act (RICO).⁴⁵

Once the government establishes that “property is subject to forfeiture, it must demonstrate that the forfeiture of this property does not constitute an excessive fine.”⁴⁶ There are three main types of asset forfeiture that the government can utilize to obtain property, including administrative, civil, and criminal asset forfeiture.⁴⁷

40. *Id.*

41. *Id.* at 347–48.

42. *Id.*

43. McCaw, *supra* note 20, at 186.

44. *Id.*

45. ZIMILES & LOCKE, *supra* note 19, § 16.4.

46. McCaw, *supra* note 20, at 187.

47. *See infra* Section II.C.

1. Administrative Asset Forfeiture

Administrative asset forfeiture is the simplest type of forfeiture and does not have to be accomplished through the court system or a judicial process.⁴⁸ This is because the act of administrative asset forfeiture is considered a “proceeding[] [that is] . . . used for uncontested seizures of property that is worth less than \$500,000 and is not real property.”⁴⁹

Administrative forfeiture can be conducted by a law enforcement agency and is considered an administrative matter that does not need to be adjudicated in court.⁵⁰ This usually occurs when a federal law enforcement agency has seized property during the scope of an investigation.⁵¹ The agency has to comply with the statutory requirements and ensure that the judicial warrant was executed with probable cause; thus meeting the requirement that the property is subject to forfeiture.⁵² The agency must then place a notice in a public forum for anyone to come forward and contest the validity of the seized property.⁵³ Real property is the major exception in this case and may not be seized and forfeited under this type of asset forfeiture; however, many other forms of property can be forfeited in this manner.⁵⁴

Prior to the enactment of CAFRA, administrative asset forfeiture proceedings were similar to abandonment cases.⁵⁵ Due process became a concern and Congress added rules to protect property owners by giving agencies specific time frames for initiating administrative proceedings and allowing property owners to file claims for the property.⁵⁶ “The agency’s failure to follow these procedures is subject to judicial review” by the courts.⁵⁷ If an individual comes forward and contests the administrative forfeiture

48. Cassella, *supra* note 36, at 353–54.

49. ZIMILES & LOCKE, *supra* note 19, § 16.2.

50. Cassella, *supra* note 36, at 353.

51. *Id.* at 354.

52. *Id.*; *see also* 18 U.S.C. § 981(b) (2012).

53. Cassella, *supra* note 36, at 354.

54. *Id.* at 355; *see also* 18 U.S.C. § 985(a) (2000).

55. Cassella, *supra* note 36, at 354.

56. *Id.* at 354–55.

57. *Id.* at 355; *see also* United States v. Schinnell, 80 F.3d 1064, 1069 (5th Cir. 1996) (“Once the administrative forfeiture was completed, the district court lacked jurisdiction to review the forfeiture except for failure to comply with procedural requirements or to comport with due process.”) (first citing United States v. Arreola-Ramos, 60 F.3d 188, 191 & nn.13–14 (5th Cir. 1995); then citing Linarez v. U.S. Dep’t of Justice, 2 F.3d 208, 211–14 (7th Cir. 1993); and then citing United States v. Giraldo, 45 F.3d 509, 511 (1st Cir. 1995)).

claim, the government will then have to commence a separate claim.⁵⁸ The government may then choose from two options of forfeiture proceedings, to commence a civil asset forfeiture or a criminal asset forfeiture proceeding.⁵⁹

2. Civil Asset Forfeiture

Civil asset forfeiture is a separate action from a criminal proceeding.⁶⁰ It occurs when the government files an action against a specific property, an *in rem*⁶¹ action, and not against a specific person.⁶² Cassella explains:

[e]ssentially then, when the government commences an *in rem* forfeiture action it is saying, “This property was derived from or was used to commit a criminal offence. For a variety of public policy and law enforcement reasons, it should be confiscated. Anyone who has a legal interest in the property and who wishes to contest the forfeiture may now do so.”⁶³

Civil asset forfeiture “does not depend on there being a criminal conviction, [therefore] the forfeiture action may be filed before indictment, after indictment, or if there is no indictment at all.”⁶⁴

Thus, for example, property owned by a defendant who is convicted of a criminal offense can be the subject of a civil forfeiture action based on the conduct underlying the criminal offense, but because the action is against the

58. Cassella, *supra* note 36, at 355.

59. *See id.*

60. ZIMILES & LOCKE, *supra* note 19, § 16.2.

61. “In rem” is a Latin term that means “[i]nvolving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing.” *In rem*, BLACK’S LAW DICTIONARY (10th ed. 2014).

62. Cassella, *supra* note 36, at 357. The following cases have ruled to uphold the idea that in a civil asset forfeiture proceeding, the action is brought against the property and not the person. *See, e.g.*, *United States v. All Funds in Account Nos. 747.034/278*, 295 F.3d 23, 25 (D.C. Cir. 2002); *United States v. \$734,578.82 in U.S. Currency*, 286 F.3d 641, 653, 655, 657 (3d Cir. 2002); *United States v. One-Sixth Share Lottery Ticket No. M246233*, 326 F.3d 36, 37 (1st Cir. 2003); *United States v. Cherry*, 330 F.3d 658, 660, 663–64, 669–70 (4th Cir. 2003).

63. Cassella, *supra* note 36, at 358.

64. *Id.* at 357.

property itself as opposed to the defendant, it constitutes civil and not criminal forfeiture.⁶⁵

By enforcing the proceeding against the property compared to the individual, it makes it easy to identify what the government is trying to obtain in a forfeiture proceeding and “give[s] anyone and everyone with an interest in that property the opportunity to come into court at one time and contest the forfeiture action.”⁶⁶

A civil asset forfeiture proceeding that goes to trial consists of two separate stages.⁶⁷ First, the government files a complaint that the property is subject to forfeiture under a specific applicable statute and must “prove by a preponderance of the evidence that the property is subject to forfeiture.”⁶⁸ The government must provide evidence that the property in the proceeding is connected to the illegal activity committed by the owner.⁶⁹

If the government establishes that the property in the asset forfeiture proceeding is subject to forfeiture by a preponderance of the evidence, then the claimant, pursuant to 18 U.S.C. § 983(d), can offer an innocent owner defense.⁷⁰ Congress ratified 18 U.S.C. § 983(d), providing the claimant with an innocent owner defense to a civil asset forfeiture, which is demonstrated by the claimant asserting “that they had no knowledge that the property was being used for illegal purposes.”⁷¹ If the claimant knew of the illegal activity, then “did all that [the claimant] reasonably could be expected to do under the circumstances to terminate such use of the property” or if the claimant can establish that he or she were “bona fide purchasers for value who, at the time of purchase, ‘did not know and was reasonably without cause to believe that the property was subject to forfeiture.’”⁷² If the claimant cannot satisfy any of these elements, then the “court will enter judgment for the government and title to the property will pass to the United States.”⁷³

65. ZIMILES & LOCKE, *supra* note 19, § 16.2.

66. Cassella, *supra* note 36, at 358.

67. McCaw, *supra* note 20, at 191.

68. *Id.*; see also 18 U.S.C. § 983(c)(1) (2012).

69. McCaw, *supra* note 20, at 191.

70. *Id.* at 191–92.

71. *Id.* at 192.

72. *Id.*; see also 18 U.S.C. § 983(d) (2012). “An innocent owner’s interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.” § 983(d)(1).

73. Cassella, *supra* note 36, at 359.

The Supreme Court has delivered two landmark decisions regarding civil asset forfeiture proceedings.⁷⁴ First, the Supreme Court held that the Double Jeopardy Clause does not apply to a civil asset forfeiture action.⁷⁵ In *United States v. Ursery*, the Supreme Court held “Congress long has authorized the Government to bring parallel criminal proceedings and civil forfeiture proceedings, and this Court consistently has found civil forfeitures not to constitute punishment under the Double Jeopardy Clause.”⁷⁶ Next, the Supreme Court held that a claimant challenging a civil forfeiture proceeding is entitled to a jury trial under the Seventh Amendment.⁷⁷ The Supreme Court stated “that the common law as received in this country at the time of the adoption of the Constitution gave a remedy *in rem* in cases of forfeiture, and that it is a ‘common law remedy’ and one which ‘the common law is competent to give.’”⁷⁸

3. Criminal Asset Forfeiture

Criminal asset forfeiture occurs as a part of the criminal sentencing process and begins only after a defendant has been convicted.⁷⁹ It is considered an *in personam*⁸⁰ action that is “directed at the defendant personally.”⁸¹ The criminal trial is “bifurcated”⁸² and the forfeiture “is considered a part of that defendant’s criminal punishment.”⁸³ In

74. See *United States v. Ursery*, 518 U.S. 267, 288 (1996) (holding that the Double Jeopardy Clause does not apply to civil asset forfeiture proceedings); *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 153 (1943) (holding that the Seventh Amendment applies to civil asset forfeiture proceedings).

75. See *Ursery*, 518 U.S. at 288. In *Ursery*, the defendant was arrested and convicted for manufacturing marijuana and was sentenced to sixty-three months in prison. *Id.* at 271. The United States government initiated forfeiture proceedings on Ursery’s house where the contraband was found, and Ursery argued that civil asset forfeiture constituted a punishment and thus the conviction violated the Double Jeopardy Clause. *Id.*

76. *Id.* at 287–88.

77. *C.J. Hendry Co.*, 318 U.S. at 153.

78. *Id.*; see also *United States v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1012 (8th Cir. 2003) (“In addition, the district court’s decision that they lack statutory standing was a ruling on the merits of their claims that violated their right to a jury trial.”).

79. ZIMILES & LOCKE, *supra* note 19, § 16.2.

80. “In personam” is a Latin term that means “[i]nvolving or determining the personal rights and obligations of the parties.” *In personam*, BLACK’S LAW DICTIONARY (10th ed. 2014). In civil procedure it means an action that is “brought against a person rather than property.” *Id.*

81. Cassella, *supra* note 36, at 356.

82. *Id.*

83. McCaw, *supra* note 20, at 193.

the indictment of the defendant's charges, the government must include the forfeiture allegations.⁸⁴ However, the government is not required to provide a detailed list of the items in the indictment.⁸⁵ After the defendant has been convicted, the government must establish by a preponderance of the evidence that there is a nexus between the property and the crime committed.⁸⁶ "[T]he court (or jury) must determine that the property in question was in fact the proceeds of the offence, or constituted facilitating property, property 'involved' in the offence, or whatever relationship between the property and the offence that the applicable forfeiture statute happens to require."⁸⁷ Once the government can prove this important nexus, then the court will enter judgment against the defendant and the property will be forfeited as part of the criminal sentence.⁸⁸

"Because this type of action [, criminal asset forfeiture,] is against a person, the Court may order forfeiture of all profits from a crime regardless of whether those profits still exist and regardless of the defendant's assets."⁸⁹ The possible assets that can be forfeited in a criminal case are "limited by statute to that property possessing a prescribed relationship with the criminal activity."⁹⁰ These categories of assets include the "'proceeds' of the underlying criminal activity" and the "property used to 'facilitate' that activity."⁹¹ Although these categories are narrowed by statute, Cassella argues that criminal asset forfeiture has an advantage over civil asset forfeiture in that "the forfeiture is directed against the defendant personally and not at particular pieces of property[;] the court can enter a money judgment against the defendant for the value of the property, or can order the forfeiture of substitute assets, if the property has been dissipated or cannot be found."⁹²

Under the criminal asset forfeiture statute, the government is authorized to seize assets that a defendant has gained illegally from

84. *Id.*

85. *E.g.*, *United States v. Grammatikos*, 633 F.2d 1013, 1024–25 (2d Cir. 1980) (holding forfeiture does not have to be alleged with particularity); *United States v. Raimondo*, 721 F.2d 476, 477 (4th Cir. 1983) (holding Rule 7(c)(2) does not require an indictment to furnish an itemized list of each item subject to forfeiture).

86. Cassella, *supra* note 36, at 356.

87. *Id.* at 356–57.

88. *Id.* at 357.

89. ZIMILES & LOCKE, *supra* note 19, § 16.2.

90. LAFAVE, *supra* note 27.

91. *Id.*

92. Cassella, *supra* note 36, at 356; *see also* *United States v. Candelaria-Silva*, 166 F.3d 19, 42–43 (1st Cir. 1999) (holding that criminal forfeiture can take the form of either money judgment, directly forfeitable property, or substitute assets).

committing a crime.⁹³ Section 853 of 21 U.S.C. authorizes the court to use substitute property if necessary when the assets that were gained from committing the crime are no longer available for criminal forfeiture for reasons, including where the property cannot be located or has been given to a third party.⁹⁴

However, one of the issues that has arisen out of this process is what happens when the defendant does not currently have the assets to satisfy a criminal forfeiture judgment, but then later gains additional assets legally.⁹⁵ Currently, the statute limits the government's ability to seize property only if the government can trace that the property being forfeited was due to the defendant's criminal activity by proving a nexus between the property and criminal activity.⁹⁶ Several Circuit Courts of Appeal have established a judge-made loophole, known as money judgment forfeitures, for this particular issue.⁹⁷ Eight Circuit Courts of Appeals have upheld a ruling that "allows the government to forfeit property without satisfying the statutory requirement that the

93. See 21 U.S.C. § 853 (2012).

94. See § 853(a)(1)–(3) (“(a) Property Subject to criminal forfeiture[.] Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State Law—(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation; (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.”). See also § 853(p)(1)–(2) (“(p) Forfeiture of substitute property[.] (1) In general[.] Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant— (A) cannot be located upon the exercise of due diligence; (B) has been transferred or sold to, or deposited with, a third party; (C) has been placed beyond the jurisdiction of the court; (D) has been substantially diminished in value; or (E) has been commingled with other property which cannot be divided without difficulty. (2) Substitute property[.] In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.”).

95. See Cassella, *supra* note 36, at 364.

96. See § 853.

97. Steven L. Kessler, *SCOTUS Limits Criminal Forfeiture in 'Honeycutt,'* N.Y. L.J., (Aug. 17, 2017, 2:00 PM), <https://www.law.com/newyorklawjournal/almID/1202795826407/SCOTUS-Limits-Criminal-Forfeiture-in-Honeycutt/>.

government trace the property sought to be forfeited to the defendant's criminal activity."⁹⁸ This means that the government can apply a money judgment forfeiture to a defendant with no assets at the time of judgment and then, when the defendant later obtains assets, he or she will have to satisfy the criminal asset forfeiture judgment that was initially imposed at sentencing.⁹⁹

In *United States v. Smith*, the lower court ordered a \$10,000 forfeiture of drug proceeds; however, the funds from the criminal conduct could not be located.¹⁰⁰ The defendant, at the time of sentencing, had insufficient personal assets to pay the \$10,000, so the substitute assets provision of § 853 was not effective.¹⁰¹ Therefore, the court decided to enter a money judgment forfeiture for the \$10,000.¹⁰²

On appeal, the defendant raised the issue of whether or not "such a judgment is authorized by the provision of § 853(p) for forfeiture of 'any other property of the defendant.'"¹⁰³ The Eighth Circuit noted that "[a]t least five [other] circuits have held that § 853 permits imposition of a money judgment on a defendant who has no assets at the time of sentencing."¹⁰⁴ The court agreed with the other Circuits' conclusions in that "[t]he statute is phrased broadly, allowing forfeiture of 'any other property of the defendant,' 21 U.S.C. § 853(p), without a temporal limit."¹⁰⁵ In other words, the court held that since the statute does not place a time limit on the criminal asset forfeiture, then it is satisfactory to enforce the money judgment when the defendant obtains any future assets.¹⁰⁶ The court further explained that "[w]hen that broad text is considered together with the express statutory direction that the provision is to 'be liberally construed to effectuate its remedial purposes,' . . . there is little doubt

98. *Id.*; see also *United States v. Blackman*, 746 F.3d 137, 145 (4th Cir. 2014); *United States v. Hampton*, 732 F.3d 687, 688, 690–92 (6th Cir. 2013); *United States v. Padron*, 527 F.3d 1156, 1162 (11th Cir. 2008); *United States v. Day*, 524 F.3d 1361, 1377 (D.C. Cir. 2008); *United States v. Jarvis*, 499 F.3d 1196, 1205–06 (10th Cir. 2007); *United States v. Vampire Nation*, 451 F.3d 189, 202–03 (3d Cir. 2006); *United States v. Casey*, 444 F.3d 1071, 1074 (9th Cir. 2006); *United States v. Hall*, 434 F.3d 42, 59–60 (1st Cir. 2006).

99. Alice W. Dery, *Overview of Asset Forfeiture*, AM. BAR ASS'N (June 21, 2012), <http://apps.americanbar.org/buslaw/blt/content/2012/06/article-02-dery.pdf>.

100. *United States v. Smith*, 656 F.3d 821, 827 (8th Cir. 2011).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

that ‘any other property’ extends to property acquired by the defendant after the imposition of sentence.”¹⁰⁷ The Eighth Circuit agreed with the other Circuits’ analysis: that “a contrary interpretation would give defendants an incentive to dissipate ill-gotten assets in order to avoid a forfeiture sanction, a result that would frustrate the remedial purpose of the statute in contravention of § 853(o).”¹⁰⁸ The Supreme Court has yet to rule on the various Circuits’ decisions in upholding such money judgment forfeitures.¹⁰⁹

C. *Abuse of the System and Response by Congress*

A major concern regarding asset forfeiture is that the system is abused by law enforcement agencies and the federal government.¹¹⁰ There are reports and statistics that show that many law enforcement agencies use civil asset forfeiture to make a profit.¹¹¹ In 2010, the Institute for Justice released statistics and a report on the abuse of the civil asset forfeiture system by police agencies.¹¹² The report argues that because assets gained through civil asset forfeiture proceedings can be kept by the government,¹¹³ “[t]his incentive has led to [the] concern that civil forfeiture encourages policing for profit, as agencies pursue forfeitures to boost their budgets at the expense of other policing priorities.”¹¹⁴ As an example, the U.S. Department of

107. *Id.*

108. *Id.*

109. Kessler, *supra* note 97.

110. The Marshall Project is a “nonpartisan, nonprofit news organization that seeks to create and sustain a sense of national urgency about the U.S. criminal justice system.” *About*, MARSHALL PROJECT, <https://www.themarshallproject.org/about> (last visited Jan. 13, 2019). The website keeps a running list of headlines related to asset forfeiture abuse. *See Asset Forfeiture Abuse: A Curated Collection of Links*, MARSHALL PROJECT, <https://www.themarshallproject.org/records/2217-asset-forfeiture-abuse> (last visited Jan. 13, 2019).

111. MARIAN R. WILLIAMS ET AL., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE, INST. FOR JUST. 6 (2010), http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf; *see also* John Malcolm, *Civil Asset Forfeiture: Good Intentions Gone Awry and the Need for Reform*, HERITAGE FOUND. (Apr. 20, 2015), <https://www.heritage.org/crime-and-justice/report/civil-asset-forfeiture-good-intentions-gone-awry-and-the-need-reform> (providing several anecdotal stories of asset forfeiture abuse including a chief of police describing civil asset forfeiture as “pennies from heaven” and a how a city attorney “was caught on videotape telling a roomful of people how police officers waited outside a bar hoping that the owner of a 2008 Mercedes would walk out drunk because they ‘could hardly wait’ to get their hands on the car.”).

112. WILLIAMS ET AL., *supra* note 111, at 6.

113. *Id.*

114. *Id.*

Justice's Assets Forfeiture Fund contained over \$1 billion in net assets from asset forfeiture in 2008.¹¹⁵ According to the study, "[o]nly 29 states clearly require law enforcement to collect and report forfeiture data" and "[i]n most states, we know nothing or next-to-nothing about the use of civil forfeiture or its proceeds."¹¹⁶

In 2000, after a growing call to reform asset forfeiture,¹¹⁷ Congress enacted a new law entitled the Civil Asset Forfeiture Reform Act (CAFRA).¹¹⁸ CAFRA provided changes mostly in the area of civil asset forfeiture¹¹⁹ and

created three statutes: (i) 18 U.S.C. § 983, which provides procedural rules for civil forfeiture proceedings, (ii) 18 U.S.C. § 985, which provides procedural rules for the civil forfeiture of real property, and (iii) 28 U.S.C. § 2465(b), which governs the return of property to claimants in the case of a wrongful civil or criminal forfeiture.¹²⁰

Some of the major reforms included in CAFRA were: "(i) strict procedural requirements, (ii) shifting the burden of proof for forfeiture from the property owner to the government, and (iii) explicitly laying out the innocent owner defense."¹²¹ The enactment of CAFRA also resulted in an expansion of criminal forfeiture law.¹²² CAFRA authorized the amendment of 28 U.S.C. § 2461(c), which allowed the government to use criminal asset forfeiture for anything that civil forfeiture was authorized for.¹²³ Furthermore:

[w]hile there are "dozens of statutes that provide criminal forfeiture authority directly," where a criminal statute has no forfeiture provision, 28 U.S.C. § 2461(c) is often viewed by courts as a "bridge" or "gap-filler" between civil and criminal forfeiture "in that it permits criminal forfeiture when no criminal forfeiture provision applies to the crime

115. *Id.*

116. *Id.* at 8.

117. Stephen J. Dunn, *Nothing Civil About Asset Forfeiture*, FORBES (Feb. 13, 2013, 3:18 PM), <https://www.forbes.com/sites/stephendunn/2013/02/18/asset-forfeiture-is-anything-but-civil/>.

118. ZIMILES & LOCKE, *supra* note 19, § 16.3; *see also* Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202.

119. *See* ZIMILES & LOCKE, *supra* note 19, § 16.3.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

charged against a particular defendant but civil forfeiture for that charged crime is nonetheless authorized.”¹²⁴

Even after the passage of CAFRA, there have still been continuing complaints about the abuse of civil asset forfeiture.¹²⁵

III. JUDICIAL CHANGE AND HONEYCUTT V. UNITED STATES

Asset forfeiture, as a concept and judicial tool, has become entrenched in how the government seizes property.¹²⁶ Even the Supreme Court has acknowledged the value of asset forfeiture by declaring that the “statutes serve important governmental interests such as ‘separating a criminal from his ill-gotten gains,’ [and] ‘returning property, in full, to those wrongfully deprived or defrauded of it,’ and ‘lessen[ing] the economic power’ of criminal enterprises.”¹²⁷ However, over the years, there have been increasing calls to curb the abuse of the asset forfeiture system.¹²⁸ Surprisingly, organizations that traditionally disagree with one another based on their political views are unified in their criticisms of asset forfeiture.¹²⁹ CAFRA was considered a response by Congress to reform parts of the asset forfeiture laws, but has only been considered a step in the right direction on a path of reformation.¹³⁰ In 2017, Congress proposed additional legislation to deal with the calls for further reform of the asset forfeiture system.¹³¹

A. *Judicial Crackdown on Asset Forfeiture Abuse*

The Supreme Court has shown its own signs of taking action to restrain how far the government can stretch its reach by using different types of asset forfeiture.¹³² In the past, the Supreme Court relied on a doctrine that focused on “‘the guilt’ of the property and

124. *Id.*

125. *See supra* notes 109–114 and accompanying text.

126. *See supra* Sections II.B.1–3.

127. *Honeycutt v. United States*, 137 S. Ct. 1626, 1631 (2017) (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629–30 (1989)).

128. *See supra* Section II.C.

129. Searby, *supra* note 23, at 1 (“[P]olitically diverse organizations as the Heritage Foundation, the Cato Institute, the American Civil Liberties Union and the National Association of Criminal Defense Lawyers have all expressed concerns for the perceived abuses of asset forfeiture.”).

130. *Id.*

131. *Id.*

132. *Id.*

not the innocence of the owner.”¹³³ However, in 1998, the Court began taking steps in a different direction.¹³⁴

In *United States v. Bajakajian*, Mr. Bajakajian attempted to leave the country without reporting “that he was transporting more than \$10,000 in currency.”¹³⁵ Mr. Bajakajian was attempting to transport \$357,100 out of the country.¹³⁶ Federal law states that if an individual willfully violates 31 U.S.C. § 5316(a)(1)(A),¹³⁷ he or she is subject to forfeiture of the entire amount that the individual was attempting to transport out of the country.¹³⁸ However, the Supreme Court ruled in *Bajakajian* that forfeiture of the entire amount “would violate the Excessive Fines Clause of the Eighth Amendment.”¹³⁹ The Supreme Court reasoned that “full forfeiture of respondent’s currency would be grossly disproportional to the gravity of his offense.”¹⁴⁰

Another restriction on the government came in the plurality opinion in *Luis v. United States*, where the Supreme Court held “that the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment.”¹⁴¹ In October 2012, Ms. Luis was charged “with paying kickbacks, conspiring to commit fraud, and engaging in other crimes all related to healthcare.”¹⁴² A court can freeze certain assets of a criminal

133. Searby, *supra* note 23, at 5; *see also* *Bennis v. Michigan*, 516 U.S. 442 (1996). In *Bennis*, the petitioner was a joint owner of a vehicle and the co-owner was arrested for sexual activity with a prostitute. *Bennis*, 516 U.S. at 443. Under a Michigan statute, the vehicle was forfeited because of the illegal activity. *Id.* The petitioner argued that she was unaware of the illegal activity and the forfeiture violated her due process under the Fourteenth Amendment. *Id.* at 444. After reviewing precedent, the Court ruled the forfeiture valid and “under these cases the Due Process Clause of the Fourteenth Amendment does not protect her interest against forfeiture by the government.” *Id.* at 446, 449.

134. *See infra* notes 135–40 and accompanying text.

135. *United States v. Bajakajian*, 524 U.S. 321, 324 (1998).

136. *Id.* at 325.

137. If an individual is transporting more than \$10,000 in U.S. currency out of the United States, then it must be reported. 31 U.S.C. § 5316(a)(1)(A) (2012). If a person willfully violates this statute, the government can seek forfeiture of the entire amount. *See* 18 U.S.C. § 982(a)(1) (2012).

138. *Bajakajian*, 524 U.S. at 324; 18 U.S.C. § 982(a)(1).

139. *Bajakajian*, 524 U.S. at 324; U.S. CONST. amend. VIII, cl. 2.

140. *Bajakajian*, 524 U.S. at 324.

141. *Luis v. United States*, 136 S. Ct. 1083, 1088 (2016); Robert Barnes, *Supreme Court Limits When the Government Can Freeze Defendants’ Assets*, WASH. POST (Mar. 30, 2016), https://www.washingtonpost.com/politics/courts_law/supreme-court-limits-when-the-government-can-freeze-defendants-assets/2016/03/30/7c496324-f69d-11e5-9804-537defcc3cf6_story.html.

142. *Luis*, 136 S. Ct. at 1087.

defendant when the defendant is accused of violating federal healthcare laws per authority set out in 18 U.S.C. § 1345.¹⁴³ The court order freezing Ms. Luis’s assets also included freezing untainted funds.¹⁴⁴ Ms. Luis argued that the asset freeze prevented her from “obtaining counsel of her choice.”¹⁴⁵ The Supreme Court agreed with Ms. Luis and reasoned “the nature and importance of the constitutional right taken together with the nature of the assets” led the Court to that conclusion.¹⁴⁶

B. Honeycutt v. United States

On June 5, 2017, the Supreme Court handed down its decision in *Honeycutt v. United States*.¹⁴⁷ The holding in this case provides more evidence that the Supreme Court is actively attempting to restrain the government’s abuse of the asset forfeiture system.¹⁴⁸ In *Honeycutt*, two brothers were indicted for selling iodine from their hardware store when they knew it was possible that the iodine was being used for manufacturing methamphetamine.¹⁴⁹ The “[g]overnment sought forfeiture money judgments against each brother in the amount of \$269,751.98, which represented the hardware store’s profits from the sale of Polar Pure,” the product which contained the iodine.¹⁵⁰ Although one brother did not have any “controlling interest in the store” and “did not stand to benefit personally” as a store employee or an owner, the brother was held “jointly [and severally] liable for the profit from the illegal sales.”¹⁵¹ The District Court denied the forfeiture request; however, the Sixth Circuit reversed the decision and applied the forfeiture to both brothers.¹⁵²

The Supreme Court, in an 8-0 decision, ruled against allowing the government to use joint and several liability in criminal asset forfeiture cases, reversing all of the Circuit Courts that had previously ruled in favor of allowing joint and several liability.¹⁵³

143. *Id.*; 18 U.S.C. § 1345 (2012).

144. *Luis*, 136 S. Ct. at 1088.

145. *Id.*

146. *Id.*; U.S. CONST. amend. VI.

147. *Honeycutt v. United States*, 137 S. Ct. 1626, 1630, 1635 (2017).

148. *See id.* at 1634–35.

149. *Id.* at 1630.

150. *Id.*

151. *Id.* at 1631.

152. *Id.*

153. Kessler, *supra* note 97.

Considered “[a] creature of tort law, joint and several liability ‘applies when there has been a judgment against multiple defendants.’”¹⁵⁴ The Court defined joint and several liability in *Honeycutt* as follows: “[i]f two or more defendants jointly cause harm, each defendant is held liable for the entire amount of the harm; provided, however, that the plaintiff recover[s] only once for the full amount.”¹⁵⁵ The Court also held:

Application of that principle in forfeiture context when two or more defendants conspire to violate the law would require that each defendant be held liable for a forfeiture judgment based not only on property that he used in or acquired because of the crime, but also on property obtained by his co-conspirator.¹⁵⁶

The attachment of joint and several liability, similar to money judgment forfeitures, is not directly authorized by statute.¹⁵⁷

The question before the Court was “whether, under § 853, a defendant may be held jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire.”¹⁵⁸ The Court examined the statute and determined that “Congress did not authorize the Government to confiscate substitute property from other defendants or co-conspirators; it authorized the government to confiscate assets only from the defendant who initially acquired the property and who bears responsibility for its dissipation.”¹⁵⁹ The Court further stated that “[p]ermitting the [g]overnment to force other co-conspirators to turn over untainted substitute property would allow the [g]overnment to circumvent Congress’s carefully constructed statutory scheme.”¹⁶⁰ In ruling on this matter, the Supreme Court stated that “the standard is not whether Congress has forbidden a remedy, but whether it has specifically authorized it.”¹⁶¹

154. *Honeycutt*, 137 S. Ct. at 1631 (quoting *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 220–21 (1994)).

155. *Id.*

156. *Id.*

157. Kessler, *supra* note 97.

158. *Honeycutt*, 137 S. Ct. at 1630.

159. *Id.* at 1634.

160. *Id.*

161. Kessler, *supra* note 97.

IV. APPLICATION OF *HONEYCUTT* AND CONGRESSIONAL ACTIONA. *Applying Honeycutt Analysis to Money Judgment Forfeitures*

Similar to joint and several liability in criminal asset forfeitures, money judgment forfeitures are not currently authorized by statute.¹⁶² Money judgment forfeitures have been created as a judge-made loophole that many of the Circuit Courts of Appeal have upheld.¹⁶³ Forfeiture is a strictly statutory creation and does not have any background in common law.¹⁶⁴ Because of this and how the Supreme Court ruled in *Honeycutt*, the Court should also apply this reasoning to money judgment forfeitures.¹⁶⁵ In *Honeycutt*, the Supreme Court established a new test and standard which states that when a statute is enacted by Congress, it is important to understand the difference between whether Congress has explicitly forbidden a remedy or “whether it has specifically authorized it.”¹⁶⁶ In the case of joint and several liability and money judgment forfeitures, the Circuit Courts of Appeal have upheld using these forfeiture tools even though the statute did not specifically authorize them.¹⁶⁷ By allowing this judicial overreach of the Circuit Courts, it unlocks the possibility that courts could continue to create more judge-made law based on whatever Congress has not specifically banned by a particular statute.¹⁶⁸ The Supreme Court in *Honeycutt* correctly rejected this reasoning.¹⁶⁹ By reviewing the forfeiture statute’s legislative history, the Supreme Court reasoned that Congress had considered and decided against expanding what is explicitly stated in the statute.¹⁷⁰ The Supreme Court articulated “[t]here is no basis to read such an end run into the statute.”¹⁷¹ In a footnote, the Supreme Court drove this rational home by stating that “the Court cannot construe a statute in a way that negates its plain text, and here, Congress expressly limited forfeiture to tainted property that the

162. *Id.*

163. *See supra* Section II.B.3.

164. *See supra* Section II.A.

165. Kessler, *supra* note 97.

166. *Id.*

167. *See, e.g.,* United States v. Honeycutt, 816 F.3d 262 (6th Cir. 2016), *rev’d*, 137 S. Ct. 1626 (2017); *see also supra* note 98 and accompanying text.

168. Kessler, *supra* note 97.

169. *See* Honeycutt v. United States, 137 S. Ct. 1626, 1634 (2017).

170. *See id.*

171. *Id.*

defendant obtained.”¹⁷² Since money judgment forfeitures have spawned from a similar creation of rulings that are not based on actual language in the statute,¹⁷³ the Supreme Court should overturn the decisions authorizing judicial overreach in the form of money judgment forfeiture using the same reasoning as *Honeycutt*.¹⁷⁴

Furthermore, part of the importance of our justice system is that a defendant receives a definitive punishment at the end of a trial.¹⁷⁵ One of the foundations of both the civil and criminal judicial systems is the idea behind the finality of a court’s decision.¹⁷⁶ A defendant, even a convicted one, has the right to this finality.¹⁷⁷ There are several important reasons for this. First, our criminal justice system values the rehabilitation of criminals.¹⁷⁸ A convicted individual will have a harder time rejoining society and subsequently contributing to the economy, if after serving their sentence, they find a job, only to have these new monetary gains taken by a money judgment forfeiture from a past judgment.¹⁷⁹ By not placing a time limit on a money judgment forfeiture, a defendant will constantly be worried about their future assets.¹⁸⁰ This only seems to be a further abuse of the asset forfeiture system, and it has not been specifically authorized by Congress through the criminal asset forfeiture statute.¹⁸¹

Second, although outside the scope of this Comment, there is an argument to be made that the tacking on of a money judgment forfeiture well after the finality of the judgment could be an Eighth Amendment issue.¹⁸² It is unclear whether the application of money judgment forfeitures on an individual could possibly constitute cruel and unusual punishment.¹⁸³

172. *Id.* at 1635 n.2.

173. *See supra* Section II.B.3.

174. Kessler, *supra* note 97.

175. *See Sentencing*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/sentencing> (last visited Jan. 13, 2019).

176. *See Witt v. State*, 387 So. 2d 922, 924–25 (Fla. 1980) (per curiam) (stating that finality is an important goal of any justice system).

177. *See id.*

178. *See* LEGAL INFO. INST., *supra* note 175.

179. *See* Kevin R. Reitz, *Economic Rehabilitation of Offenders: Recommendations of Model Penal Code (Second)*, 99 MINN. L. REV. 1735, 1738–39 (2015).

180. The imposition of sanctions is justified by the argument that imposing those sanctions furthers the remedial purpose of the forfeiture statutes, regardless of whether the criminal defendant has the assets or not. *See, e.g., United States v. Casey*, 444 F.3d 1071, 1074 (2006).

181. Kessler, *supra* note 97.

182. *See* U.S. CONST. amend. VIII.

183. *See id.*

B. Congress Addressing Asset Forfeiture Abuse and Overreach

If the Supreme Court does not take steps to apply the same analysis to money judgment forfeiture, then Congress should provide an amendment to the statute to reduce ambiguity and clarify the scope of the statute's reach. This would help continue to curb the abuse of asset forfeiture laws in the United States, as exemplified by the overreach of local law enforcement agencies.¹⁸⁴ It appears that this would be a simple solution for Congress; however, passing legislation appears to be difficult in the current political environment in the nation's capital.¹⁸⁵ It is hard to determine if the political willpower is available to create a new statute or simply amend the current statute.¹⁸⁶

Congress should consider two options in amending the statute. The first option is rather simple. Congress should merely amend the statute to state "No other asset forfeiture remedy is authorized that is not specifically stated in the statute." This language would align with the reasoning in *Honeycutt*, and also strike down the Circuit Courts of Appeal upholding of money judgment forfeitures.¹⁸⁷ It would make clear that the only options for asset forfeiture would be the ones that are provided for in the statute. The government would have more specific instructions on what asset forfeiture options were available, thus continuing to curb the abuse of the system.¹⁸⁸

The second option is for Congress to place a time limit on the application of money judgment forfeitures. Under the current Federal Rules of Criminal Procedure, the court at any time can order forfeiture if substitute property is found and falls under an existing applicable forfeiture statute.¹⁸⁹ However, under § 853(a) of the United States Code, forfeiture is limited to tainted property acquired or used by the defendant.¹⁹⁰ Since future earnings would not be considered tainted, future forfeiture would be unavailable.¹⁹¹ Congress could amend the statute to use money judgment forfeitures

184. See *supra* Section II.C.

185. See Sheryl Gay Stolberg & Nicholas Fandos, *As Gridlock Deepens in Congress, Only Gloom Is Bipartisan*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/2018/01/27/us/politics/congress-dysfunction-conspiracies-trump.html>.

186. See *id.*

187. See *Honeycutt v. United States*, 137 S. Ct. 1626, 1633–34 (2017).

188. See *supra* Section II.C; see generally Civil Assets Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202.

189. FED. R. CRIM. P. 32.2(e)(1).

190. 21 U.S.C. § 853(a) (2012).

191. See *id.*

on future earnings if it felt that this type of forfeiture was in the best interests of justice. Congress should determine what a reasonable amount of time would be to allow a money judgment forfeiture. A reasonable amount of time would probably range in the one to three year period because this is less than the five-year standard limitation for most federal offenses,¹⁹² but it provides a defendant with a more reasonable time frame to reenter society without fear of a post sentence enforcement of a money judgment forfeiture.¹⁹³

The effects of this reform would be twofold. First, it would allow a defendant to not be in fear of gaining personal assets in the future and having to directly turn them over to the forfeiture as stated above.¹⁹⁴ Second, it would provide a framework for the courts to understand that simply because a statute does not specifically deny an action does not mean that the action can be freely taken by the courts. This would further align with the Supreme Court's analysis in *Honeycutt*.¹⁹⁵

V. CONCLUSION

Asset forfeiture in the United States is a system that is ripe for reform.¹⁹⁶ There have been particular abuses in the system that, if left unchecked, could continue to provide government and law enforcement agencies easy ways to profit from the system of civil and criminal asset forfeiture.¹⁹⁷ The Supreme Court, through its decision in *Honeycutt*, has demonstrated that the system needs to reduce the level of abuse.¹⁹⁸ The Supreme Court should apply its reasoning in *Honeycutt* to money judgment forfeitures, and if not, then Congress should enact new legislation to combat the unfairness of the judge-made loophole.¹⁹⁹

192. See 18 U.S.C. § 3282(a) (2012).

193. See Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 116–17 (2008).

194. See *supra* Section IV.A.

195. See *Honeycutt v. United States*, 137 S. Ct. 1626, 1634–35 (2017).

196. See *supra* Section II.C.

197. See *supra* Section II.C.

198. See *supra* Section III.B.

199. See *supra* Sections IV.A–B.